In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. ~~252~~ 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMER, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above-entitled case on January 10, 1956.

OPINIONS BELOW.

The opinion of the District Court, entitled "Order Re Motions for Summary Judgment" (R. 24-26) was not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 63-65) has not as yet been officially reported. The latter opinion and the judgment of the Court are printed in Appendix B, *infra*, pp. vi-xi.

JURISDICTION.

The judgment of the United States Court of Appeals was dated January 10, 1956, and was entered on that date (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

May Petitioners, the trustees of a health and welfare trust fund established by collective bargaining for the benefit of construction laborers, recover payments agreed to be made into the fund with respect to work performed by laborers on federal projects in an action under the Miller Act against the prime contractor and its surety on payment bonds furnished pursuant to that Act?

STATUTE INVOLVED.

The statute involved is the Miller Act, Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C., Sections 270a-270d. The provisions of this Act are printed in Appendix A, *infra*, pp. i-v.

STATEMENT OF THE CASE.

Petitioners constitute the Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California (hereinafter referred to as the "Fund") which was established by collective bargaining for the benefit of laborers employed on construction projects in the 46 Northern counties of California.

The collective bargaining agreements which provided for the establishment of the Fund were negotiated by two Chapters of The Associated General Contractors of America, Inc., on behalf of the contractor employers, and the Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America, on behalf of the employees (Admissions, Exh. C, R. 21). The agreements were so-called "Master Labor Agreements" which provided the wage rates and many other terms and conditions governing the employment of construction laborers in the Northern California area (R. 50). On the subject of health and welfare, the agreements provided that commencing on February 1, 1953, each individual employer covered by the

agreements would contribute the sum of seven and one-half cents per hour for each hour worked by employees under the agreements to the Fund (Amended Complaint, par. X, R. 7-8).

The Fund itself was established by a Master Trust Agreement dated March 4, 1953, which was negotiated pursuant to the Master Labor Agreements by the parties to those agreements (Admissions, Exh. C, R. 21). The Trust Agreement provides that the Board of Trustees of the Fund shall have the power to demand and enforce the prompt payment of the contributions agreed to be paid to the Fund (Art. IV, Sec. 3). It likewise provides that the Board shall promptly use the monies available in the Fund to provide the benefits specified in the Health and Welfare Plan (Art. IV, Sec. 4). Pursuant to this directive, the Board has procured insurance policies which have provided substantial benefits for construction laborers and their families, in the form of life insurance, accidental death and dismemberment benefits, hospital expense benefits, surgical expense benefits, X-Ray and laboratory expense benefits, and supplemental accident expense benefits (R. 39-40).

The Trust Agreement provides that no employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan except as provided in the insurance policies procured by the Board of Trustees (Art. VIII, Sec. 2). The agreement also provides that contributions to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such pay-

ments are made'"[1] and that no employee shall be entitled to receive any part of the contributions made to the Fund in lieu of the benefits provided by the Health and Welfare Plan (Art. II, Sec. 3). In the actual operation of the Health and Welfare Plan, an employee is required to work at least 400 hours in a designated six-month period for one or more contributing employers in order to acquire eligibility for insurance coverage under the Plan for the succeeding six-month period (R. 40). Thus, each hour of work under one of the Master Labor Agreements requires the individual employer to pay seven and one-half cents into the Fund **for the benefit of the employee who actually performs the work,** which results in a credit **to that particular employee's individual account with the Fund** toward eligibility to receive the substantial benefits provided by the Fund for him and his dependents.

Respondent Carter Construction Company was represented in collective bargaining by the Associated Home Builders of Sacramento, which was one of the contractor associations signatory to the Master Labor Agreements and to the Master Trust Agreement (Admissions, Exh. C, p. 21, R. 21). The Company employed construction laborers on two construction projects for the United States Government, and thereafter defaulted in contributions due to the Fund for the months of February, March and April, 1953. Under the terms of the Master Trust Agreement, this

[1]Emphasis is added throughout this petition unless otherwise noted.

default subjected the Company to an additional liability to the Fund for liquidated damages in the amount of $20 for each monthly delinquency and for reasonable attorneys' fees, court costs and other reasonable expenses incurred by the Board of Trustees in connection with the collection of the delinquent payments (Admissions, Exh. C, Art. II, Sec. 8, and Art. IV, Sec. 3, R. 21).

As required by the Miller Act (U.S.C. 40:270a), the Carter Construction Company had provided a payment bond with respect to each of the Government projects. Petitioners brought this action against the Carter Construction Company and against respondent Hartford Accident and Indemnity Co., the surety in its bonds, to recover the delinquent health and welfare contributions, liquidated damages and attorneys' fees. The action was brought in the District Court pursuant to section 2(b) of the Miller Act (App. A, *infra*, p. iii).

Petitioners and respondent surety entered into a stipulation of facts in the District Court (R. 13-21) which was made the basis for a motion and cross-motion for summary judgment (R. 11-12, 23-24). The District Court granted respondent surety's motion for summary judgment (R. 24-27), and petitioners appealed from the resulting judgment (R. 28-29).

The Court of Appeals affirmed the judgment of the District Court, writing a brief opinion which is printed as Appendix B to this petition (*infra*, pp. vi-x). In this opinion the Court first noted that the question before it was one "of first impression";

it then distinguished a case recently decided in favor of petitioners in the State court (*Sherman v. Achterman, infra*, App. C, pp. xii-xxiii)[2] on the ground that the case involved a payment bond required by a State statute; and finally, since it was conceded that petitioners themselves had not actually furnished labor for the bonded projects, it concluded that petitioners could not bring themselves within the letter of the Miller Act.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari sought by this petition should be granted for the reasons (1) that the Court of Appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, and (2) that its decision on this question is in conflict with applicable decisions of the Supreme Court.

I.

THE IMPORTANCE OF THE QUESTION INVOLVED.

A. From the standpoint of the protection of the individual laborer.

This court has repeatedly declared that the Miller Act and its predecessor statutes must be liberally construed for the protection of laborers and material-

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[2]Since the decision in this case is not officially reported and since the decision is directly pertinent to the question presented by this petition, a copy of the decision is appended as Appendix C to the petition.

men (*Guaranty Co. v. Pressed Brick Co.* (1903) 191 U.S. 416, 426; *Hill v. American Surety Co.* (1906) 200 U.S. 197, 203; *Mankin v. Ludowici-Celadon Co.* (1910) 215 U.S. 533, 537; *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32; *Equitable Surety Co. v. McMillan* (1914) 234 U.S. 448, 455; *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337; *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360; *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444; *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17).

In so doing the Court has but carried out the clearly expressed will of Congress. For example, in the discussion which preceded passage of the Miller Act in the Senate, the following transpired (79 Cong. Rec. 13383):

> "Mr. Walsh. Mr. President, I will say to the Senator from Nevada and to the Senator from Nebraska that the investigation conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and **any measure that will tend to strengthen their rights and help them to secure their compensation is justified.**
>
> Mr. McCarran. **That is the object of the pending bill,** and I might augment what the Senator from Massachusetts has said as to what has been shown by the hearings to which he has referred.
>
> Mr. Walsh. I did not believe it was possible for men repeatedly to get contracts from the Fed-

eral Government and chisel, the way some of them do, against the wages of the employees."

When the Court of Appeals held that petitioners could not recover in this proceeding because they did not personally furnish labor to the projects involved, the practical effect of such holding was to impose a serious and unwarranted limitation upon the protection provided to construction workmen by the Miller Act.

Until recent years the entire consideration agreed to be paid for labor on construction projects was paid to the individual workmen in the form of hourly or per diem wages. Within the past fifteen years, however, building trades unions have negotiated an increasing number of collective bargaining agreements throughout the country which have required that a portion of this agreed consideration be paid by contractors into welfare funds for the benefit of the workmen. The development along this line has been so marked that in 1954 a subcommittee of Congress reported that welfare plans are "now part and parcel of the entire fabric of wages and working conditions in an employee's 'contract of employment'" (Interim Report on "Welfare and Pension Plan Investigation," January 10, 1954, Subcommittee on Welfare and Pension Funds of Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess., p. 3).[3]

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[3]The current importance of negotiated welfare funds is unquestioned. In a message to Congress submitted January 11, 1954, the

Negotiated welfare funds had become so important a part of our national economy by 1947 that Congress enacted Section 302 of the Labor Management Relations Act (U.S.C. 29:186), which imposed strict limitations and regulations upon the administration of such funds for the protection of the individual employees. In so legislating, Congress acted upon the basic premise that the payments by employers into such funds were in consideration for the services of the employees and should be expended solely for the benefit of such employees.

The Senate Committee on Labor and Public Welfare reported concerning this provision of the Labor Management Relations Act as follows (S.Rep. No. 105, 80th Cong., 1st Sess., p. 52):

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session [is proposed]. It does not prohibit welfare funds but merely requires

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President said (100 Cong. Rec. 111; U. S. Code Cong. & Adm. News, 1954, p. 1533):

> "It is my recommendation that Congress initiate a thorough study of welfare and pension funds covered by collective-bargaining agreements, with a view of enacting such legislation as will protect and conserve these funds for the millions of working men and women who are the beneficiaries."

See, also, the President's Message on the State of the Union, January 5, 1956, 102 Cong. Rec. 136, U. S. Code Cong. & Adm. News, 1956, p. 49.

Subsequent to the Interim Report cited in the text, the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare submitted a further interim report dated July 20, 1955, and its study is continuing. The Committee on Education and Labor of the House of Representatives has also been studying negotiated welfare and pension funds pursuant to H. Res. 115, 83d Congress, 1st Session.

that, if agreed upon, such funds be jointly administered—**be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy.** The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, **in consideration of the services of employees,** to the union treasury or the union officers, except under the process of strict accountability."

". . . It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, **which could otherwise be paid to the union members in wages,** the use of such funds be strictly safeguarded."

The importance and value of the portion of a construction laborer's compensation which is now represented by employer contributions to welfare funds is well illustrated by the benefits provided by the Fund administered by petitioners. These benefits consist of $2000 life insurance on the laborer, plus accidental death and dismemberment insurance in the amount of an additional $2000; life insurance on dependents ranging from $100 to $1000 depending upon age; and hospital and surgical benefits for the non-occupational injury or illness of the laborer and his dependents, consisting of full reimbursement for the cost of ward service in a hospital for a maximum of 70 days, reimbursement for special hospital charges in full up to $400 plus 75% of charges over $400, surgical ex-

pense benefits under a $300 surgical schedule, reimbursement for doctor's home, office and in-hospital calls, X-ray and laboratory expense reimbursement up to $50 and supplemental accident expense payments up to $300.

The money which a federal works contractor pays into petitioners' welfare fund with respect to each hour of work of an individual laborer on a federal project gives that specific laborer a credit toward eligibility for the substantial benefits described above. If the laborer accumulates credit for 400 or more hours of work during a stated six-months period, he and his dependents then become eligible for benefits from the fund for the succeeding six-months period.

The decision of the Court of Appeals has denied to this laborer the security of the contractor's payment bond for these payments. If the money is not paid, it is the laborer, not the petitioners, who suffers the loss. Petitioners have the right to sue, but in suing they act as trustees for the laborer and for his benefit. **Consequently, when the Court of Appeals held that a Miller Act bond furnishes no protection to petitioners, what it also held was that the Act gives no protection to the laborer for the substantial and important portion of the consideration for his labor which the contractor agreed to pay into the Fund.**

B. From the standpoint of the United States Government.

The question involved in this proceeding is also important from the standpoint of the United States Government.

The purpose of the Miller Act is not only to protect laborers and materialmen against loss but also to protect federal projects from the delays which would inevitably result if suppliers of labor and material were relegated to other means for the enforcement of their just demands (*Standard Ins. Co. v. United States* (1938) 302 U.S. 442; *City of Stuart v. American Surety Co.* (5th C.C.A. 1930) 38 F. (2d) 193, 195).

Since it has been stipulated that the agreement to make health and welfare contributions was part of the consideration for the services of the laborers who worked on the bonded projects (R. 7-9, 13), a breach of that agreement would clearly entitle the laborers to withdraw their services and their union to exercise its economic power of striking and picketing to remedy the default (*Sherman v. Achterman, infra,* App. C., p. xv; *Dunbar Co. v. Painters & Glaziers District Council No. 51* (D. C. D. of C. 1955) 27 CCH Labor Cases, para. 68,921, p. 88,093). **The holding, therefore, that building tradesmen are not entitled to the protection of a Miller Act bond insofar as payments to welfare funds are concerned leaves every federal project in the vast areas in which such funds are now established vulnerable to interruption and delay if the contractor becomes delinquent in his payments.**

II.

THE QUESTION SHOULD BE SETTLED BY THE SUPREME COURT BECAUSE CONSTRUCTION OF THE LITERAL WORDS OF THE MILLER ACT TO EFFECTUATE THE CLEAR OBJECTIVES OF THE ACT REQUIRES "A DEGREE OF IMPLICATION" WHICH CAN BEST BE MEASURED BY THIS COURT.

The court below made no effort to interpret the provisions of the Miller Act in the light of the legislative history of the Act and the beneficent purposes the Act was intended to serve. It dismissed the case of *Sherman v. Achterman* (*infra,* App. C, pp. xii-xxiii), the only direct precedent cited by either side, as "clearly distinguishable" because the case involved a State Act bond rather than a Miller Act bond, without attempting to reconcile the fact that the objectives of the State Act and the Miller Act are identical. Its decision was grounded solely and squarely upon the fact that, if the Miller Act is read and applied literally, "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided for in said contract' " (App. B, *infra,* p. viii). Petitioners did not wield picks or push wheelbarrows on the bonded projects; ergo, they are not entitled to sue under the Miller Act.

This approach to the interpretation of the Miller Act is in direct conflict with the approach this Court has taken to similar problems arising under the Act and its predecessor statutes. (See authorities cited *supra,* p. 8). Understandably, therefore, the interpretation itself is in conflict with the decisions of this Court which are most applicable to the basic question involved.

The literal terms of the Miller Act, and its predecessor statutes, have always presented a difficult problem of interpretation from the standpoint of effectuating the objectives of Congress.

In *Hill v. American Surety Co.* (1906) 200 U.S. 197, this court had before it the question whether a statute which required a contractor's bond conditioned "that such *contractor or contractors* shall promptly make payments to all persons supplying *him or them* labor or materials in the prosecution of the work provided for in such contract" (200 U.S. 201), gave protection to a claimant who had furnished services and materials to a subcontractor. It is apparent from the words we have italicized that if this Court had followed the approach adopted by the court below in this case, it would have answered the question in the negative. Instead, it answered in the affirmative, saying (p. 203):

> "But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.
>
> Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter.' *United States v. Freeman*, 3 How. 556. **'The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called**

in to aid that intent.' Chief Justice Marshall in *Durousseau v. United States*, 6 Cranch, 307."

In all of the decisions which have succeeded the *Hill* case, this Court has consistently heeded the admonition of that case concerning respect for the spirit of the statute and the intent of its makers. The considerations stated in the *Hill* case were reiterated in *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32 (holding that a wooden steamer was a "public work" within the meaning of the statute), in *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337, and *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360 (construing and reconciling the ambiguous time limitations of the Heard Act), in *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444 (holding that a railroad which transports material for a public structure furnishes "labor" within the meaning of the statute) and in *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17 (holding that the provisions of the Miller Act specifying the method of serving notice on the prime contractor are directory only).

The court below acknowledged that the case before it was one of "first impression" (App. B, *infra*, p. viii), but it gave no consideration whatever to the pertinency of the *Hill* case and the many other applicable decisions of this Court to the solution of the question presented to it. It is not surprising, therefore, that the court's conclusion that "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided in

said contract' " (App. B, *infra*, p. viii) is in direct conflict with decisions of this Court.

In *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, this court held that an assignee of the persons who furnished labor and materials to a project can sue on the bond. Speaking tersely and to the point, it said (p. 35):

> "The assignment of some of the claims did not affect the remedy. *United States v. Rundle*, 100 Fed. Rep. 400."

In the *Rundle* case the court explained its holding as follows (100 Fed. 403):

> "The general rule is that an assignment of a debt carries with it the security. The application of this general principle to such cases as the present accords with the obvious purpose of the statute, while the limited construction contended for by the defendants in error might very well deprive those for whom the security was intended from realizing on their claims by assignment."

To the same effect, see:

U. S. Fidelity Co. v. Bartlett (1913) 231 U. S. 237;

Bartlett & Kling v. Dings (8th C.C.A. 1918) 249 Fed. 322, 325;

United States v. Brent (W.D.S.C. 1916) 236 Fed. 771, 777.

The court below summarized its holding as follows (App. B, *infra*, pp. ix-x):

> "The appellants [petitioners] are not persons who furnished labor or materials and therefor

> may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor."

Assignees of laborers and materialmen are not "persons who furnished labor or materials" and yet this Court has held that they may maintain actions for recovery on Miller Act bonds. Where an assignment of labor claims has been made, the sums claimed are no longer "justly due" to the persons who furnished the labor, yet under the decisions of this Court, such fact has not barred the assignee from a recovery.

The decision of the court below in this case demonstrates that the literal terms of the Miller Act require a "degree of implication" in order to effectuate the clear intent of Congress to protect the laborer and to guard public projects against delay. Obviously, this Court, which speaks with finality on the subject, is in the best position to call in and measure accurately this degree of implication in aid of the Congressional intent. The rules heretofore established by this Court for the interpretation of the Miller Act were not applied below in the decision of this important question of first impression, and hence this Court should grant certiorari to resolve the conflict with its prior decisions.

III.

THE DECISION BELOW IS ERRONEOUS SINCE THE RIGHT OF RECOVERY ON A MILLER ACT BOND IS NOT LIMITED TO PERSONS WHO HAVE ACTUALLY FURNISHED LABOR OR MATERIALS IN THE PROSECUTION OF THE WORK. ASSIGNEES OF SUCH PERSONS ARE ENTITLED TO SUE ON THE BOND AND PETITIONERS HAVE THE SAME STANDING IN THIS REGARD AS ASSIGNEES.

As we have shown (*supra*, p. 17) this Court has held directly that assignees of laborers and materialmen are entitled to sue on Miller Act bonds.

In the only direct precedent in this relatively new and as yet uncharted field of the law, a referee in bankruptcy sitting in California ruled that under California law the trustees of a fund similar to that administered by petitioners were assignees of the employee beneficiaries of the fund by virtue of an equitable assignment (*Matter of Schmidt* (S.D. Calif. 1953) 24 CCH Labor Cases, par. 68,012). This decision is unquestionably sound under the California law since under that law, as declared in the leading case of *McIntyre v. Hauser* (1900) 131 Cal. 11, at p. 14:

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place."

To the same effect, see:

Goldman v. Murray (1912) 164 Cal. 419, 422.

It clearly appears from the entire transaction whereby the Fund administered by petitioners was

established that the construction laborers who are the beneficiaries of the Fund have assigned to petitioners all of their rights in the portion of the consideration for their services which their employers have agreed to pay into the Fund. By the terms of the Trust Agreement the laborers are divested of any right to receive any part of the contributions to the Fund (R. 21, Ex. C, Art. II, Sec. 3) and petitioners are expressly given the right and authority to enforce the prompt payment of such contributions (R. 21, Exh. C, Art. IV, Sec. 3). As the collective bargaining representative of the laborers, the Northern California District Council of Hod Carriers, Building and Construction Laborers had the authority to make this bargain on their behalf (*Potlatch Forests v. International Woodworkers* (D. Ida. 1951) 108 F. Supp. 906, *aff'd* (9th C.C.A. 1953), 200 F. (2d) 700; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (CIO) (Ore. 1955) 279 Pac. (2d) 508, 512, *reh'g den.*, 280 Pac. (2d) 412; *cf. National Labor Relations Board v. W. W. Cross & Co.* (1st C.C.A. 1949) 174 F. (2d) 875), and they are bound by the bargain. Accordingly, title to this portion of the consideration for the laborers' services is vested in petitioners and the essential element of an equitable assignment under California law is established.

In this connection, the very provisions of the Trust Agreement (R. 21) which make clear that the employees have transferred all of their interest in the health and welfare contributions to petitioners as trustees for their benefit—namely, the provisions that

"contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made"—were cited by the court below in support of its conclusion that petitioners could not bring themselves within the terms of the Miller Act (App. B, p. ix). The decisions of this Court with regard to assignees were brought to the attention of the court below by counsel, and the argument here made was presented to that court, but it saw fit to ignore both in its opinion. The decision below cannot be reconciled with the decisions of this Court concerning assignees and the resulting conflict presents clear ground for granting certiorari.

Further, the consideration which led this Court to recognize the right of assignees to sue on a Miller Act bond argues even more persuasively for a similar recognition of the right of trustees such as petitioners to sue on the bond.

The *Rundle* case makes clear that the purpose of recognizing assignees as proper parties plaintiff is to enable laborers and materialmen to realize on their claims by assignment (*supra*, p. 17). When a laborer assigns his claim against a defaulting contractor he frequently does so at a discount, and when the assignee sues for the full amount of the claim, he acts in part for his personal benefit. Petitioners as trustees, on the other hand, are suing for the sole benefit of the laborers and whatever they recover will enure in its entirety to the benefit of such laborers. They are more

truly representative of the laborers who actually performed services on the bonded projects than assignees would be, and their right to sue in their own names for the benefit of such laborers is clear under the decisions of this Court (*Stone v. White* (1937) 301 U.S. 532, 536; *Kerrison, Assignee v. Stewart* (1876) 93 U.S. 155, 160), under the Federal Rules of Civil Procedure (Rule 17(a)) and under the statutory and decisional law of California (California Code of Civil Procedure, section 369; *Thorpe v. Story* (1937) 10 Cal. (2d) 104, 114; *City of Oakland v. California Construction Co.* (1940) 15 Cal. (2d) 573, 578; *City of Oakland v. De Guarda* (1928) 95 Cal. App. 270, 285).[4]

CONCLUSION.

For the foregoing reasons, we submit that if the approach to the interpretation of the Miller Act marked out by this Court is followed, no difficulty is encountered in bringing petitioners within the purview of that Act. The court below did not follow this approach and as a consequence it fell into error.

The question presented herein is clear-cut, the record is short and uncomplicated and the matter is one of major and current significance. The rights of the laborers represented by petitioners compare favorably

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[4]The parties considered petitioners' right to sue so clear that such right was conceded by respondent surety in the District Court. Counsel for respondent there said (R. 33): [We] are not making any issue as to their [petitioners'] right to bring this action . . . We are not interested in raising any question of right to sue, capacity or any such matters."

in importance with those of boarding house keepers involved in *Brogan v. National Surety Co.* (1918) 246 U.S. 257, and those of railroads involved in *Standard Insurance Co. v. United States* (1938) 302 U.S. 442, and they are entitled to the same thorough and judicious consideration as was accorded to the latter by this Court. This, we respectfully submit, they have not yet received, and accordingly this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
March 7, 1956.

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(Appendices A, B and C Follow.)

Appendix A

The provisions of the Miller Act (Act of August 24, 1935, c. 642, 74th Cong., 1st Sess., 49 Stat. 793, 40 U.S.C., Secs. 270a-270e) are as follows:

AN ACT requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled.

Section 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all

persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expira-

tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District

Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Section 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Section 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before

the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended, is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

Appendix B

United States Court of Appeals for the Ninth Circuit

United States of America for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and and Welfare Trust Fund for Northern California,

Appellants,

vs.

Donald G. Carter, Individually; Donald G. Carter, Doing Business as Carter Construction Company; Carter Construction Company and Hartford Accident and Indemnity Co.,

Appellees.

No. 14,703
Jan. 10, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: HEALY and LEMMON, Circuit Judges, and BYRNE, District Judge.

BYRNE, District Judge

Appellants filed suit on a bond furnished by Carter, as contractor, and executed by Hartford Accident and

Indemnity Company, as surety, pursuant to the provisions of the Miller Act (40 U. S. C. 270(a) et seq.) to recover health and welfare contributions alleged to be due on account of labor performed on public work of the United States. The District Court granted Hartford's motion for summary judgment and this appeal followed.

The material facts which are not in dispute may be summarized as follows: Carter as general contractor entered into two written contracts with the United States of America for the construction of certain buildings at Travis Air Force Base and Mather Field in California. Under the terms of the contracts Carter was required to furnish the materials and pay the labor at wage rates set forth in the specifications which were a part of the contracts. Under the terms of the bond Hartford was obliged to make these payments in the event Carter defaulted. During the critical period with which we are concerned, there was in existence a collective bargaining agreement entered into between an employers' organization, of which Carter was a member, and an employees' organization of which the laborers employed by Carter were members. Pursuant to this agreement Carter was obligated to pay into a "Health and Welfare Fund" the sum of seven and one-half cents per hour for each hour worked by laborers employed by him. Carter paid in full the wage rates required under the terms of the contracts, but did not make the contributions to the Fund as he was obliged to do under the collective bargaining agreement. Following this default Carter be-

came a bankrupt and the trustees of the Fund are here seeking recovery of the delinquent health and welfare contributions from the surety.

The question for decision is whether the surety is liable under its bond for the delinquent health and welfare contributions. Not only is this a question of first impression, but there is a dearth of cases involving analogous questions. Appellants rely upon *Sherman v. Achterman* decided by the Appellate Department of the California Superior Court and unreported. As noted by the Court in that case, it was an action upon a bond required by a state statute and is clearly distinguishable from a case involving a Miller Act bond.

The Miller Act, Section 270(a) of Title 40 U.S.C., requires that before any contract exceeding $2,000 for the construction of a public work of the United States is awarded to any person, such person must furnish to the United States a payment bond *for the protection of all persons supplying labor and material* in the prosecution of the work provided for in said contract. Section 270(b) of the Act provides that every person *who has furnished labor or material* in the prosecution of the work and who has not been paid in full therefor shall have the right to sue on such payment bond for the *sum due him.*

It is at once apparent that recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in said contract". There is no contention

that these appellants who were plaintiffs below furnished labor or material in the prosecution of the work provided for in said contracts, but they contend that the Miller Act is to be liberally construed and that in so construing it we should disregard the plain requirement of the Act.

The appellants argue that the payments which the contractor agreed to make to them were a part of the consideration and compensation for the labor which was performed on the contracts. It is true that the agreed contributions were *measured by the* amount of labor performed on the projects and it might even be said that the agreement to make the contributions was a part of the consideration for the contract between the contractor and the Union, but that is not the test for recovery here. Recovery can be had on a Miller Act bond only by a "person who has furnished labor or material" and recovery is limited to "sums justly due" such persons. The agreement between the Associated General Contractors and the Union specifically provides that contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made.

The appellants are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments

sought to be recovered are not "sums justly due" the persons who furnished the labor.

AFFIRMED.

(Endorsed:) Opinion. Filed Jan. 10, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

United States of America for the Benefit and on Behalf of Harry Sherman, etc., Appellant, vs. Donald G. Carter, Individually; etc., et al., Appellees.	No. 14,703

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellees and against the Appellant.

It is further ordered and adjudged by this Court, that the Appellees recover against the Appellant for their costs herein expended and have execution therefor.

(Endorsed) Judgment
Filed and Entered: January 10, 1956
Paul P. O'Brien, Clerk

Appendix C.

FILED
MAY 18, 1955
MARTIN MONGAN, Clerk
By J. F. Witman
Deputy Clerk

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION

These appeals present a question new to the courts of this state. The facts are undisputed, the appeals being based on judgments upon orders sustaining demurrers without leave to amend, and are set forth in

the next paragraph as they have been copied from the opinion of the learned judge who rendered the judgments.

This is an action against a firm of contractors and the insurance company furnishing the construction bond, for alleged default in payment of wages due laborers.

The complaint, by appropriate allegations, sets forth the execution, by the contractors, of two building contracts. The complaint further recites that a written Trust Agreement was entered into between the contractors, as members of an Employers' Association, and the Union representing certain employees on the job in question, whereby the contractors would contribute and pay into a Health and Welfare Fund, established by said above-mentioned contract, the sum of 7½ cents per hour for each hour worked by laborers in its employ on said jobs.

The contractor defaulted in making the required payments into the Fund for workmen on the two jobs bonded, and plaintiffs, as Trustees of the Health and Welfare Fund above mentioned, seek recovery on the bond. By general demurrer, the defendant insurance company questions the sufficiency of facts to constitute a cause of action, and also the legal capacity of the plaintiffs to sue.

The trial judge sets forth the test upon which the decision was made, as follows: "If the payments are part of wages due the laborers, the sums are within the provisions of the bond. If they are not such payments, no cause of action is stated."

However, the statute does not refer to wages, but requires that the bond provide that the surety will pay, when the contractor fails "to pay for any materials, provisions, provender or other supplies, or teams used in, upon, for or about the performance of the work contracted to be done, *or for any work or labor thereon of any kind. . . .*"

There may be, and these days there often are, payments for work or labor which are not wages. Measured by the test of "wages" plaintiff would have some difficulty at once, because the Trust Agreement expressly provides that the contribution to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such payments are made." Whether this clause would prevent plaintiffs from showing that, in a broad sense, the payments are "wages", we need not decide. They are payments for labor.

We believe that the statute, and, therefore, the bonds (which, under well known provisions of the law of suretyship, must be coequal with the requirements of the statute (*Los Angeles Stone Co. v. National Surety Co.*, 178 Cal. 247)) cover the payments required under the Trust Agreement.

Viewed from the standpoint of the employer, what else are these but payments for the performance of work? Why, except to purchase labor, did the employer agree to make the payments? Viewed from the employees' aspect, the payments must be regarded as payments for labor, too. The employees had a vital interest in having these payments made, because to the extent there was failure, the Fund would be diminished.

The Fund is not something which can be made up from other sources, including stockholders' equities in capital and surplus, such as are the resources of privately owned insurance carriers, which may supply workmen's compensation insurance. It is a pool created by collective bargaining, and it has the character of a reward for labor. If the employer were to announce, at the commencement of a public job, that he would not make the payments called for by the collective bargaining agreement, no doubt the labor unions would not supply the workers, and they would be perfectly within their rights. A payment "for labor" would have been defaulted.

It does not seem important to us that the *benefits* from the Fund were not allocable to the particular job; the payments *into* the Fund were so allocable, and the default reduced the Fund pro tanto.

Finally, from the standpoint of the public interest, these payments would seem to be "for labor". As appellant points out, the union could strike when these payments were not made, thus delaying public improvements. This is not by any means, as respondent intimates in its brief (p. 2) a "threat of labor delays and strikes if this Court's decision is not in favor of appellant." It is simply a statement that if an employer fails to pay what admittedly he should pay, and his surety does not have to make up his principal's deficiency, there could be a strike (though there was none in this case), and that the public has an interest in preventing such interruption of public work, brought about by the employer's default.

Since the judgment by the trial court, the Supreme Court of Oregon has decided a case which considers

the nature of agreements for group insurance of employees. The case is that of *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America,* 279 Pac.2d 508; 60 Ore. Adv. Sheets 67. The Court there held that a group insurance program is primarily for the benefit of the members of the union, and is the subject of collective bargaining as covered by the National Labor Relations Act, and that individual employees who do not wish to participate must, nevertheless, be subject to the agreement made by their union. Thus, the subject has been taken away from the employees, individually. The Court held that there is no real difference between an "employee-paid" plan where the 7½¢ is actually deducted from the worker's wage, and an "employer-paid" plan where the amount agreed upon in the collective bargaining agreement is paid directly by the employer to the trustees. The court says (60 Ore. Adv. Sheets, at p. 76):

> "Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs."

We are aware that in the *Coos Bay* case the 7½¢ was referred to as a wage increase, and that in the present case the required payments were stated *not* to be wages (no doubt to avoid the very difficulty that arose in the *Coos Bay* case, where some of the indi-

vidual employees wished the sums paid to them, not to the Fund), but the result was the same; in neither case did the employee actually receive the amounts into his pocket, whether they were called wages or not. The case is important because it shows there is no real distinction between employer-paid and employee-paid plans, a distinction which the trial court made in the present case. (opinion, p. 4.)

We examine now the authorities cited; first those given by respondent.

The first is, *City of Portland ex rel. National Hospital Association,* 9 Pac. 2d 115, which was cited in the Court's memorandum as well. In that case, the contractor had agreed with the City of Portland, in connection with public work done for the city, that he would "fully secure and pay just claims, if any there be, of all persons furnishing labor or material under said contract." The contractor agreed with the hospital association to pay a certain amount for each employee (and the contractor deducted that amount from the wages, although the contract with the hospital association was silent on this) in return for health coverage. When the contractor defaulted, the association sought to obtain payment of its fees from the surety.

It was held that the surety was not liable. The Supreme Court held that under its contract the association was not concerned with the source of its fees, for it could look to the contractor for them whether or not he deducted them from the employees' wages. The employee owed the association nothing, and "here-

fore could not have been deemed to have assigned anything to the association. Thus, there was no one before the Court who came within the category set forth in the statute, namely, "all persons furnishing labor" etc.

We believe the *City of Portland* case is to be distinguished from the one before us on at least three grounds. In the first place, the Oregon statute refers to the *persons* to whom claims shall be paid, that is, "persons furnishing labor"; but the California statute refers to the *subject matter* for which the contractor has defaulted, that is, his failure "to pay . . . . for any work or labor."

In the second place in the Oregon case it was a matter more or less of indifference to the laborer whether or not the health association was paid, because he was entitled to benefits anyway. This feature also distinguishes our holding in *California Western States Life Ins. Co. v. U.S.F. & G. Co.*, Civil Appeal No. 2189, wherein we held that the Unemployment Disability carrier's premium is not covered by the surety bond of a public works contractor. This is because it does not concern the employee, who has no substantial interest whether the premium is paid or not. The same holds true of the cases of compensation carrier premiums.

Finally, the *City of Portland* case was decided in 1932, before the time of the National Labor Relations Act, which makes such plans for health insurance the subject of collective bargaining on behalf of all the employees. (*Coos Bay* case, supra.)

Also, we believe distinguishable are the several cases in which it has been held that income taxes withheld by the employer are not within the provisions of labor and material bonds. The laborer has no interest (above that of any citizen) in the payment to the government of his withheld taxes. His taxes are deemed paid even if the contractor fails to remit to the government, and he gets whatever refund he may be entitled to, though the employer has defaulted.

Likewise, it has been stated that the government has ample power to protect itself in order to collect taxes. (*Gen. Casualty Co. v. United States,* 205 Fed. 2d 753, 755.) The United States need not appear as standing in the shoes of an unpaid workingman.

The case of *United States ex rel. Sherman v. Carter,* 33521, decided by the U. S. District Court on January 21, 1955 (and now on appeal), is cited by respondents. The contract, under collective bargaining, for payment of employee health and welfare contributions, is the same as the one before us. The Court held that such payments are not recoverable from the defunct contractor's surety under the Miller Act. (Title 40 USCA 270a et seq.) However, apart from the fact that the judgment has been appealed, and in any case is not controlling upon us, we find it is to be distinguished from California cases in two respects: First, the Miller Act, in Section 270b of the United States Code, reads:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment

> bond is furnished under section 270a of this title and who has not been paid in full"

may recover from the surety. Thus, as in the *City of Portland* case statute, the statute refers to the *person* who may collect, rather than to the *subject matter,* as does the California statute. This is by no means a too-refined distinction, because the Court pointed out in the *Carter* case, supra, that the *laborers* had been paid in full. In a sense, perhaps, they had been so paid; but, considering that there were no payments coming to *them,* or to trustees for them, it does not follow that there were no payments due *for labor,* as the California statute states it.

In the second place, the Miller Act evidently is to protect "those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws." (*Carter* case, pp. 1 and 2; *United States v. Harman,* 192 Fed. 2d 999.)

Considering, finally, the reasoning of the Court in the *Carter* case to the effect that the benefits are not allocable to the employees on the specific job, but are reserved for employees on any job who have worked 400 hours in a six-month period, we think that it is not of importance, at least so far as the California statute is concerned. The test is that set forth in the statute. If the payments are for labor, they are covered by the surety bond.

It is argued by respondents that the fact that section 2404 of the Government Code was amended to

include within its provisions payments due under the Unemployment Insurance Act is proof that other "fringe" benefits are not so included. But we think the legislature, when courts decided that the unemployment payments were not covered, simply made haste to cover them; we do not think the legislature would have those payments included and these excluded.

These cases presently before us are, as stated at the outset, the first ones before the courts. It seems to us that when the contractor and the union agreed upon payments by the former of the welfare funds, it was an agreed payment "for labor"; that the surety company could ascertain that these payments were to be made and could base its premium rates accordingly, just as this contractor must have included them in his estimate of the cost of the job. They were ascertainable as much as were outright wages.

The judgments based on the orders sustaining the demurrers without leave to amend are reversed.

Dated, May 18th, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.

I dissent. I agree with the opinion of Judge Caulfield of the Municipal Court.

/s/ Daniel R. Schoemaker
Judge.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION ON PETITION FOR REHEARING

On Petition for Rehearing it is urged that plaintiffs have no right to bring the action because: (a) they are not parties to the bond; and, (b) the cause of action is created by Section 4205 of the Government Code, not Section 4204 of that Code.

Although this argument was not stressed at the hearing before us and was not convincing to the trial court, nevertheless we have given it full consideration. We did not decide the case on the inability of counsel to answer a question put to him on oral argument.

We believe that although plaintiffs are not parties to the bond they may maintain the action as trustees.

The United States Labor Relations Act contemplates that there may be such a trusteeship. (18 U.S.C. Sec. 186, Sub. Div. 5.) Section 369 C.C.P. allows trustees to sue. We think it likely that there was at least an equitable assignment to the trustees. In re Schmidt, 24 Labor Cases (CCH) #68012). If the facts of the case do not sustain this proposition, it will be remembered that we are deciding upon judgment after sustaining of a demurrer without leave to amend.

We believe, too, that Sections 4204 and 4205 of the Government Code are cumulative, that the bond must comply with both, and that it is not necessary that one be entitled to the benefits of mechanics' lien laws in order to be protected under the public works surety acts. It has been held that the latter acts are broader in scope (*A. L. Young Mch. Co. v. Cupps*, 213 Cal. 210 and cases cited therein), and that, procedurally, one may sue on a contractor's bond without resorting to the Mechanics Lien Statutes. (*Sunset Lumber Co. v. Smith*, 95 Cal. App. 307.) If Section 4205 of the Government Code were the only one "creating" rights against the surety, what is the purpose of Section 4204? We do not believe it is merely a prelude to 4205.

The petition for rehearing is denied.

Dated, June 17, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LAILOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF PETITIONERS.

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Subject Index

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Statutes

Miscellaneous

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court, entitled "Order re Motions for Summary Judgment" (R. 24-26), was

not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 63-65) is reported at 229 F. (2d) 645.

JURISDICTION.

The judgment of the United States Court of Appeals was dated January 10, 1956, and was entered on that date (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The writ of certiorari herein was applied for on March 12, 1956, which was within ninety days after the entry of the judgment, as required by 28 U.S.C., Section 2101(c).

STATUTE INVOLVED.

The statute involved is the Miller Act, Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C., Sections 270a-270d. The provisions of this Act are printed in Appendix A, *infra*, pp. i-v.

QUESTIONS PRESENTED.

May Petitioners, the trustees of a health and welfare trust fund established by collective bargaining for the benefit of construction laborers, recover payments agreed to be made into the fund with respect to work performed on federal projects in an action under the Miller Act against the prime contractor and its surety on payment bonds furnished pursuant to that Act?

The agreed payments fall into three categories as follows:

(a) Contributions in the sum of seven and one-half cents per hour which the prime contractor agreed to pay into the fund with respect to each hour worked by laborers on the project.

(b) Liquidated damages in the sum of $20 per delinquency or 10% of the amount of the contribution due, whichever is greater, which the prime contractor agreed to pay into the fund if he failed to make the agreed contribution prior to a delinquency date specified in the trust agreement.

(c) Reasonable attorneys fees, court costs and all other reasonable expenses incurred in connection with a suit for delinquent contributions, which the prime contractor had agreed should be added to his obligation in the event such a suit became necessary.

STATEMENT OF THE CASE.

I. The Nature of the Controversy.

Petitioners constitute the Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California (hereinafter referred to as the "Fund") which was established by collective bargaining for the benefit of laborers employed on construction projects in the 46 Northern Counties of California.

The collective bargaining agreements which provided for the establishment of the Fund were nego-

tiated in June, 1952, by two Chapters of The Associated General Contractors of America, Inc., on behalf of the contractor employers, and the Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America, on behalf of the employees (Admissions, Exh. C, R. 21). The agreements were so-called "Master Labor Agreements" which provided the wage rates and many other terms and conditions governing the employment of construction laborers in the Northern California area (R.50).

On the subject of health and welfare, the Master Labor Agreements provided that commencing on February 1, 1953, each individual employer covered by the agreements would contribute the sum of seven and one-half cents per hour for each hour worked by employees under the agreements to the Fund (Amended Complaint, par. X, R. 7-8).

The Fund itself was established by a Trust Agreement dated March 4, 1953, which was negotiated pursuant to the Master Labor Agreements by the parties to those agreements (Admissions, Exh. C., R. 21). The Trust Agreement provides that the Board of Trustees of the Fund shall have the power to demand and enforce the prompt payment of the contributions agreed to be paid to the Fund (Art. IV, sec. 3). It likewise provides that the contributions shall be payable in regular monthly installments on the fifteenth of the month following the month in which they accrue (Art. II, sec. 7); that any installment not

paid by the twenty-fifth of the month in which it comes due shall be delinquent, and the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, shall thereupon become due and payable to the Fund as liquidated damages and not as a penalty (Art. II, sec. 8); and that if the Board files suit for any delinquent contributions or payments, "there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit" (Art. IV, sec. 3).

Respondent Carter Construction Company was represented in collective bargaining by the Associated Home Builders of Sacramento, which was one of the contractor associations signatory to the Master Labor Agreements and to the Trust Agreement (R. 7, 21). The Company employed construction laborers on two construction projects for the United States Government, and thereafter defaulted in contributions due to the Fund for the months of February, March and April, 1953 (R. 9).

As required by the Miller Act (40 U.S.C., sec. 270a), the Carter Construction Company had provided a payment bond with respect to each of the Government projects. Petitioners brought this action against the Carter Construction Company and against respondent Hartford Accident and Indemnity Co., the surety on its bonds, to recover the delinquent health and welfare contributions, liquidated damages and attorneys fees. The action was brought in the District Court

pursuant to section 2(b) of the Miller Act (App. A., *infra*, p. iii).

II. The Nature of the Fund and the Health and Welfare Plan.

The Master Labor Agreements which provided for the initial establishment of the Fund, and which have since maintained the Fund in continuous existence, are the collective bargaining agreements which govern the employment of laborers on all construction projects of any size throughout the vast area comprising the 46 Northern Counties of California (hereinafter referred to as the "46-County area"). On the side of the employer, over 5,000 contractors and builders are bound to the agreements either through membership in one of the AGC Chapters or the 19 signatory associations (R. 21, Exh. C, p. 21) or by the deposit of written acceptances pursuant to Article IX of the Trust Agreement (R. 21, Ex. C., p. 19). On the side of the employee, over 20,000 construction laborers are represented by the Laborers District Council and work under the agreements.

The first provisions in these Master Labor Agreements calling for contributions to the Fund were negotiated in June, 1952 (R. 21, Exh. C., p. 2), at a time when wage controls established under the Defense Production Act of 1950 (Act of Sept. 8, 1950, c. 932, 64 Stat. 798, 50 U.S.C., App., secs. 2061 *et seq.*) were in effect.

Section 702 of the Defense Production Act of 1950 provided:

> "(e) The words 'wages, salaries, and other compensation' shall include all forms of re-

muneration to employees by their employers for personal services, including, but not limited to, vacation and holiday payments, night shift and other bonuses, incentive payments, year-end bonuses, **employer contributions to or payments of insurance or welfare benefits,** employer contributions to a pension fund or annuity, payments in kind, and premium overtime payments."[1]

The parties to the Master Labor Agreements were the customary parties who in accordance with customary practice negotiated the collective bargaining agreements establishing the prevailing wage rates for laborers employed on construction projects in the 46-County area, and the negotiations concerning contributions to the Fund were conducted in the light of the then current policy statements of the Construction Industry Stabilization Commission of the Wage Stabilization Board and subject to the regulations of that Commission, particularly including Regulation No. 2 dealing with Health and Welfare Plans (published on April 15, 1952, 17 F.R. 3351).

By resolution of the Construction Industry Stabilization Commission of March 20, 1952, approved on March 13, 1952, by the Wage Stabilization Board, W.S.B. Release No. 209, April 9, 1952, the Commission announced that until December 31, 1952:

"I. In acting upon applications for approval of increases in compensation for mechanics and laborers in the building and construction industry, the Construction Industry Stabilization

[1]Throughout this brief emphasis is ours unless otherwise noted.

Commission will be guided by the following policies:

* * * * * * *

"(B) *Fringe Benefits:* (1) In addition to wage increases approved under Section A of this Resolution, the Commission may also approve employer contributions of not more than 7½¢ to health and welfare funds limited to the payment of temporary disability benefits, hospital expense benefits, surgical expense benefits, medical benefits, term life insurance and accidental death and dismemberment benefits. The details of the policy are set forth in CISC Regulation 2 which provides for the approval of such contributions in addition to the increases allowable under Section A."

Section 2(b) of Regulation No. 2 of the Construction Industry Stabilization Commission provided, in part, as follows:

"(b) *Approval of agreements to establish plans.* If the parties desire to provide for payments into health and welfare funds prior to the establishment of a plan, the Commission, upon application under Section 4 hereof, will normally approve employer contributions in an amount not exceeding 7.5 cents per hour for each hour worked by his employees in job classifications to be covered by the plan, if but only if, the contributions are payable to a depository or trustees under a written agreement stipulating—

* * * * * * *

"(3) that no part of such fund will be paid to a labor organization or employees except in the form of the aforesaid health and welfare benefits, . . ."

During the time that intervened between the negotiation of the Master Labor Agreements which first provided for contributions into the Fund and March 4, 1953, when the negotiations for the Trust Agreement were concluded, the President issued Executive Order No. 10434 on February 6, 1953 (18 F.R. 809), suspending all wage and salary controls. Accordingly, when the Trust Agreement was signed, the above-quoted provisions of CISC Regulation No. 2 were no longer applicable.

The parties to the Trust Agreement, however, continued to be subject to the provisions of Section 302 of the Labor Management Relations Act of 1947 (61 Stat. 157; 29 U.S.C., sec. 186), and the provisions of the Agreement comply strictly with the requirements of subsection (c)(5) of that Section.[2]

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[2]Section 302 provides, in pertinent part, as follows:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable .... (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the fore-

Section 1 of Article II of the Trust Agreement provides for the creation of the Fund "which shall consist of all contributions required by the collective bargaining agreements to be made for the establishment and maintenance of the Health and Welfare Plan, and all interest, income and other returns thereon of any kind whatsoever". Section 1 of Article III provides that the Fund shall be administered by a Board of Trustees on which the employees and the employers are equally represented. Section 4 of Article IV provides that the Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. Sections 1 and 2 of Article VII pro-

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going, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

vide that in the event the employer and employee representatives on the Board of Trustees deadlock on the administration of the Fund, the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the United States District Court for the Northern District of California. Section 9 of Article IV provides for an annual audit of the Fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable places as the Board of Trustees may designate from time to time.

In addition to the provisions required by Section 302 of the Labor Management Relations Act, the Trust Agreement contains the following provisions which are pertinent to the question involved in this case:

Section 3 of Article II provides:

> "Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan."

Section 4 of Article II provides, in part, as follows:

> "Neither the Employers, any signatory association, any individual employer, the Union, any beneficiary of the Health and Welfare Plan nor any other person shall have any right, title or interest in the Fund other than as specifically

provided in this agreement, and no part of the Fund shall revert to the Employers, any signatory association or any individual employer. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debt, contracts or liabilities of the Employers, any signatory association, any individual employer, the Union, or any employee. . . ."

Section 1 of Article IV provides:

"The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Health and Welfare Plan in effect."

Section 3 of Article IV provides:

"The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim."

Section 4 of Article IV provides:

"The Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. The Board shall have power to enter into contracts and procure insurance policies necessary to place into effect and maintain the Health and

Welfare Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of the Plan, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts or policies. Any such contract may be executed in the name of the Fund, and any such policy may be procured in such name."

Section 5 of Article IV provides:

"The Board of Trustees shall have power:

* * * * * * *

"(G) To adopt rules and regulations for the administration of the Fund and the Health and Welfare Plan which are not inconsistent with the terms and intent of this agreement and such Plan."

Section 2 of Article VIII provides, in part, as follows:

"No employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan, except as specified in the policy or policies, or contract or contracts, procured or entered into pursuant to section 4 of Article IV. . . ."

The Health and Welfare Plan which the Board of Trustees maintains in effect pursuant to the authority given in the Trust Agreement provides life insurance, accidental death and dismemberment insurance, hospitalization and surgical benefits, X-ray and laboratory expense payments and supplemental accident benefits for eligible laborers and their dependants (R. 39). The Board has provided by regulation that any laborer who works for one or more contributing employers at

least 400 hours in a designated six-month period shall be entitled to the benefits of the Plan for the succeeding six-month period (R. 40).

Thus, in the actual operation of the Fund and the Health and Welfare Plan, the contribution made by a contributing employer with respect to each hour of work by a particular laborer is paid into the Fund, and the Fund thereupon gives that laborer a credit which, when combined with credits for at least 399 additional hours of work for that employer or any other contributing employer during a six-month period, entitles the laborer to participate in the substantial benefits provided by the Plan.

III. The Decisions Below.

Petitioners and respondent surety entered into a stipulation of facts in the District Court (R. 13-21) which was made the basis for a motion and cross-motion for summary judgment (R. 11-12, 23-23). The District Court granted respondent surety's motion for summary judgment (R. 24-27), and petitioners appealed from the resulting judgment (R. 28-29).

The Court of Appeals affirmed the judgment of the District Court, writing a brief opinion which is printed as Appendix B to the petition for certiorari (pp. vi-x). In this opinion the Court first noted that the question before it was one "of first impression"; it then distinguished a case recently decided in favor of petitioners in the State court (*Sherman v. Achterman*, App. C to Petition for Certiorari, pp. xii-xxiii) on the ground that the case involved a payment bond

required by a State statute; and finally, since it was conceded that petitioners themselves had not actually furnished labor for the bonded projects, it concluded that petitioners could not bring themselves within the letter of the Miller Act.

SUMMARY OF ARGUMENT.

If the parties to the Master Labor Agreements had agreed that the wages of the construction laborers would be increased by seven and one-half cents per hour and that this wage increase would be contributed by their employers to the Fund, it would be conceded that the contributions to the Fund would have been a part of the compensation for the services furnished by the laborers. Because of existing wage controls, and because of practical considerations connected with setting up a workable health and welfare plan for casual employees such as construction laborers, the parties did not adopt this course, but instead provided that the employers would make their contributions directly to the Fund and that such contributions would be free of any claim of the employees with respect to whose work they were made.

Notwithstanding this approach to the problem of setting upon a health and welfare plan, however, it is clearly apparent from the entire transaction that in the minds of the parties and in actual fact, the contributions to the Fund constituted an important part of the agreed consideration for the services of the laborers. This view of the intrinsic nature of em-

ployer contributions to welfare funds is shared by Congress, which has stated its view that such contributions are to be considered and treated as a part of the compensation of the employees with respect to whose work the contributions are made.

When the contributions in suit are considered in this light, it is apparent that the terms of the Miller Act cannot be satisfied unless the contributions are held to be within the coverage of the payment bond required by that Act. The Act, by its terms, contemplates that the payment bond shall be security for the payment *in full* of the agreed compensation for the labor furnished to a federal public works project, and until the contributions due the Fund have been made, the labor to which such contributions relate has not been paid for in full.

The provision of the Act stressed by the court below, namely, that the sums sought to be recovered be "justly due" to the persons who furnished the labor, does not bar a recovery by petitioners. This Court has held that this provision does not bar a recovery on the bond by assignees of the persons who furnished the labor, since otherwise the purpose of the Act to protect and benefit the laborers would be defeated. Petitioners are not only assignees in equity of the laborers but they are also more truly representative of the laborers than assignees would be, since they sue as trustees for the benefit of the laborers and not for their personal account.

The conclusion that the payment bond required by the Miller Act should be construed to cover health and

welfare contributions is further confirmed by the fact that such construction of the bond is necessary to protect federal public works projects against disruption and delay by reason of enforcement action which would otherwise be necessary to secure payment of the contributions. A failure to pay the contributions is a breach of the collective bargaining agreements which provide for the contributions and under which the federal projects are manned. Such breach would justify the laborers in withholding or withdrawing their services, thus effectively preventing performance of the federal projects.

Insofar as petitioners' claim for liquidated damages and attorneys' fees are concerned, the obligation to pay these sums in the event of default is a part of the total obligation assumed by the prime contractor in consideration for the services supplied to him by the laborers. Accordingly, these sums are likewise covered by the payment bonds supplied by respondent surety.

ARGUMENT.

I.

THE CONTRIBUTIONS AGREED TO BE PAID TO THE FUND ARE A PART OF THE COMPENSATION OF THE LABORERS WITH RESPECT TO WHOSE WORK THEY ARE PAYABLE, AND UNTIL SUCH CONTRIBUTIONS HAVE BEEN MADE, THE LABORERS HAVE NOT BEEN PAID IN FULL FOR THEIR LABOR.

If the parties to the Master Labor Agreements had approached the problem of establishing a health and welfare plan for construction laborers by providing

for a wage increase of seven and one-half cents per hour and then for the deduction of this amount from the wages of the laborers and payment of the amount into the Fund, there could have been no dispute as to the fact that such payment would be a part of the compensation for the services rendered by the laborers.

At the time the agreement to make contributions into the Fund was negotiated, however, this alternative was not available. Federal wage controls were then in effect, and the governing policies and regulations announced by the Construction Industry Stabilization Commission, quoted *supra* at pp. 7-8, indicated that such an approach to the problem would not be approved.

Equally important, further, was the fact that the casual nature of employment in the building and construction industry made direct employer contributions into the Fund, unfettered at the point of contribution by the possible claims of the individual workmen, a practical necessity.

The parties could not hope to provide health and welfare benefits to each employee who performed one hour of work subject to one of the Master Labor Agreements. Provision had to be made for the establishment of reasonable eligibility rules which would fix a minimum period of employment under the Agreements as a prerequisite to insurance coverage. Accordingly, it was essential to give the Board of Trustees the power to establish such rules, and to divest the individual employees of any claim to the

contributions which might interfere with the exercise of such power.

In addition, regulatory laws applicable to employment in the building and construction industry required that the Trust Agreement clearly state that the individual employees would have no claim to the contributions to the Fund on any theory that such contributions constituted "hourly wages" within the traditional concept of that term.

The Davis-Bacon Act (46 Stat. 1494; 40 U.S.C., secs. 276a-276a-7) requires that on federal public works projects the prime contractor and his subcontractors must pay all mechanics and laborers employed directly upon the site of the work, "unconditionally and not less often than once a week, and without subsequent deduction or rebates on any account," the full amount of the prevailing wages determined by the Secretary of Labor pursuant to that Act. While certain deductions from these wages are permitted by the Anti-Kickback Regulations of the Secretary of Labor (Code of Fed. Reg., tit. 29, subtit, A, pt. 3, secs. 3.1-3.9), deductions for payments to health and welfare funds are not specifically approved in the regulations and therefore any plan which was construed to involve such deductions would require specific applications to the Secretary for approval on every project affected (ibid., sec. 3.5(b).[8]

[8]Section 3.5(b) of the Anti-Kickback Regulations provides as follows:

"(b) Any deduction is also permissible which in fact meets the following standards, and with respect to which the contractor or subcontractor shall have made written application by

The Fair Labor Standards Act (52 Stat. 1060, as amended; 29 U.S.C., secs. 201 *et seq.*) provides in section 7(d) (29 U.S.C. 207(d)) that in computing the "regular rate" of an employee for purposes of overtime an employer may exclude

> "(4) contributions irrevocably made . . . to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees."

Under the interpretations of the Wage and Hour Administrator, this exclusion is lost if the health and welfare plan gives the employee "the option to receive any part of the employer's contributions in cash instead of the benefits under the plan" (Code of Fed.

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registered mail to the Secretary of Labor, a copy of which application shall be sent to the contracting agency by the contractor or subcontractor, setting forth all the pertinent facts indicating that such deductions will meet the following standards:

(1) That such deduction is not prohibited by other law; and

(2) That such deduction is (i) voluntarily consented to by the employee in writing and in advance of the period in which the work was done, and that consent to the deduction is not a condition either for the obtaining of or for the continuance of employment; or (ii) that such deduction is for the benefit of the employees or their labor organization through which they are represented and is provided for in a bona fide collective bargaining agreement; and

(3) That from such deduction no payment is made to, nor profit or benefit is obtained directly or indirectly by the contractor or subcontractor or any affiliated person, and that no portion of the funds, whether in the form of a commission or otherwise will be returned to the contractor or subcontractor or to any affiliated person; and

(4) That the convenience and interest of the employees are served thereby, and that such or similar deductions have been customary in this or comparable situations."

Reg., tit. 29, pt. 778, sec. 778.6(g)(3)(v)). Accordingly, in order not to complicate the computation of overtime, it was essential to make clear that the individual laborer had no claim to his employer's contributions.

The State law likewise presented problems which could not be ignored. Section 204 of the California Labor Code provides that "all wages . . . earned by any person in any employment are due and payable twice during each calendar month." Section 224 of the same Code provides that an employer may withhold or divert a portion of an employee's wages "when a deduction is expressly authorized in writing by the employee." Sections 10202.8 and 10270.5 of the California Insurance Code prohibit the issuance of a group life insurance policy or a group disability insurance policy to trustees of an industry fund where "the entire premium is to be derived from funds contributed by the insured persons specifically for their insurance."

That the parties' concern with these legal provisions was not fanciful is illustrated by the decision of the Federal District Court in *International Woodworkers, Local 6-64, CIO v. McCloud River Lumber Co.* (N.D. Cal. 1953) 119 F. Supp. 475, wherein the court held that under a health and welfare plan financed by a wage deduction which equalled a wage increase negotiated by the union, section 224 of the California Labor Code required that individual written authorizations be obtained from all of the employees involved. Such a requirement imposed upon a health and wel-

fare plan of the size of the Laborers Plan would have made the plan completely unworkable.

For all of the foregoing reasons, the parties to the Master Labor Agreements provided in the Trust Agreement, as already noted (*supra*, p. 11), that contributions to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such payments are made" and that "no employee shall be entitled to receive any part of the contributions made to the Fund in lieu of the benefits provided by the Health and Welfare Plan." (Art. II, sec. 3).

It clearly appears from the entire transaction, however, that in the minds of the parties and in actual fact, the agreement of the employers to make contributions to the Fund was an important part of the consideration to be paid for the services of the laborers who were to work under the Master Labor Agreements. The obligation to make such contributions was a part of the same collective bargaining agreements which fixed the hourly wage rates to be paid to the laborers. As developed later in greater detail (*infra*, pp. 33-34), the obligation was negotiated on behalf of the laborers by their established collective bargaining representative, and at the time of such negotiations, the obligation represented an increase in compensation within the meaning of the Defense Production Act of 1950 which at that time required prior approval of the Construction Industry Stabilization Commission to become effective (*supra*, pp. 7-8). The contribution with respect to each hour of work of a particular

laborer gave that laborer an important and valuable right, namely, a credit toward insurance coverage by the Fund which could result in payments to the laborer or his beneficiaries greatly exceeding the amount of the total contributions made on his behalf. Consequently, these contributions constituted, in a very real and immediate sense, a part of the compensation agreed to be paid for the services of the laborers.

The matter was well expressed by the Oregon Supreme Court in *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America, CIO* (1955) 203 Or. 342, 279 P. (2d) 508, *reh'g. den.*, 280 P. (2d) 412, when it said (279 P. (2d) 512):

> "Although in the cases just reviewed no distinction arose between employer-paid and employee-paid insurance programs, the Potlatch and Inland Steel decisions plainly decided that the term 'wages' as used in the Labor Management Relations Act embraces what, for convenience, may be referred to as employer-paid plans. Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs. **Both situations involve substantially the same thing: a wage increase which takes the form of group insurance. As compared with the situation where a collective bargaining agreement provides for a so-called employer-paid plan, a contract between an employer and a union, such as the one before us, only indicates more specifically what such a group insurance plan**

really is when it provides that it is to be financed by a wage increase. Therefore, the distinction between employer-paid and employee-paid plans, is at best one of form, not of substance, and the rights of the parties are the same in the two situations. *International Woodworkers of America, Local 6-64, C.I.O. v. McCloud River Lumber Co., D. C.,* 119 F. Supp. 475, 486, in interpreting the provisions of a health and welfare insurance program substantially the same as the one before us, said:

> "'To this Court, the difference between a "wage increase intended as the method of financing the health and welfare plan" and "a wage increase to pay for a Health and Welfare Program for the employees" seems like the difference between tweedledum and tweedledee!'"

Further, there can be no possible question but that Congress considers that employer contributions to negotiated health and welfare funds are a part of the agreed compensation for the services of the employees with respect to whose work the contributions are made.

By section 302 of the Labor Management Relations Act, already quoted *supra,* pp. 9-10, Congress undertook to impose strict limitations and regulations upon the administration of such funds for the protection of the individual employees. In so legislating, it acted upon the basic premise that the payments by employers into such funds were in consideration for the services of the employees and should be expended solely for the benefit of such employees.

The Senate Committee on Labor and Public Welfare reported concerning this provision of the Labor Management Relations Act as follows (S. Rep. No. 105, 80th Cong., 1st Sess., p. 52):

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session [is proposed]. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered —be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy. The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, **in consideration of the services of employees**, to the union treasury or the union officers, except under the process of strict accountability.
>
> ". . . It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, **representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages**, the use of such funds be strictly safeguarded."

In more recent years Congress has resumed its study of negotiated welfare and pension funds, proceeding upon the same basic assumption expressed in the above cited committee report, namely, that contributions to such funds are an integral part of the consideration for the services of the employees involved.

In an interim report on "Welfare and Pension Plan Investigation", January 10, 1954, 84th Congress, 1st Session, at p. 3, the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare reported that welfare plans are today "part and parcel of the entire fabric of wages and working conditions in an employee's 'contract of employment.'"

In its final report on the "Welfare and Pension Plans Investigation", made pursuant to S. Res. 225 (83d Congress) and S. Res. 40 as extended by S. Res. 200 and S. Res. 232 (84th Congress), and submitted April 6, 1956 (Sen. Report No. 1734, 84th Cong., 2d Sess.), the Subcommittee reported (pp. 3-6):

> "These employer-employee plans, whether or not collectively bargained, or whether contributed to solely by management, or on a joint management-employee basis, actually, and under existing law, proceed **on the basis that the contributions to them by management are in the nature of employees' compensation for employment or, stated in another way, '. . . that the cost of an employee's service is greater than the amount currently paid him as wages.'** . . . We find that it has not followed that the employees accordingly have a right to know the cost of the programs, how the money is spent, the reserves maintained, and how the programs are managed."
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> * * * * * * *
>
> "The subcommittee, on the basis of its studies and investigations, makes the following findings and conclusions:

"1. Private employee welfare and pension programs have grown to such proportions in this country and involve the use of such large tax-exempt funds as to place upon the Government a grave responsibility for their sound operation and to protect the equities of the beneficiaries and the public interest.

* * * * * * *

"(d) Since Congress has stated and the courts have held that employer contributions toward welfare and pension benefits are **in the nature of compensation to employees**, it must be concluded that whether the funds for such programs are contributed by the employers, the employees, or both, the employees have a right to know the financial details of such plans as well as to have their interest in such plans protected."

It is apparent from the foregoing that, in the eyes both of the parties to the Master Labor Agreements and of Congress, the contributions agreed to be paid to the Fund are a part of the compensation of the laborers with respect to whose work they are payable, and until such contributions have been made, the laborers have not been paid in full for their labor.

II.

THE PROVISIONS OF THE MILLER ACT CAN AND SHOULD BE CONSTRUED AS EXTENDING THE PROTECTION OF THE PAYMENT BOND REQUIRED BY THAT ACT TO THE PORTION OF THE LABORERS' COMPENSATION REPRESENTED BY CONTRIBUTIONS TO THE FUND.

A. This conclusion follows when the Act is construed from the standpoint of the protection of the individual laborer.

When the Miller Act is construed in the light of the clearly expressed view of Congress concerning the nature of employer contributions to health and welfare plans, it is obvious that the terms of the Act cannot be satisfied unless such contributions are held to be within the coverage of the payment bond required by the Act.

The bond is required to be furnished "for the protection of all persons supplying labor . . . in the prosecution of the work . . ." A right of action on the bond is given to "[e]very person who has furnished labor . . . in the prosecution of the work . . . and who has not been paid **in full** therefor . . ."

A laborer who has performed work on a federal project pursuant to the Master Labor Agreements has not been paid "in full" for such work until the contractor has paid the agreed contributions to the Fund required by the Agreements with respect to such work. If these contributions were held not to be covered by the bond, the laborer would not receive the protection promised by the Act as to this portion of his compensation.

Upon this analysis, which we submit is correct, the issue becomes one as to whether the terms of the Act emphasized by the court below, namely, the provision

that the action on the bond be for "sums justly due" the person who actually furnished the labor, should be construed as a limitation upon the important benefits intended to be conferred on laborers by the Act. We will therefore address our argument to this issue.

The basic consideration which governs the resolution of the issue was stated by this Court in *Hill v. American Surety Co.* (1906) 200 U.S. 197.

In the *Hill* case this Court had before it the question whether a statute which required a contractor's bond conditioned "that such *contractor or contractors* shall promptly make payments to all persons supplying *him or them* labor or materials in the prosecution of the work provided for in such contract" (200 U.S. 201), gave protection to a claimant who had furnished services and materials to a subcontractor. It is apparent from the words we have italicized that if this Court had followed the approach adopted by the court below in this case, it would have answered the question in the negative. Instead, it answered in the affirmative, saying (p. 203):

> "But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.
>
> Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter.' *United States v. Freeman*, 3 How. 556. **'The spirit as well as the letter of a**

> **statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.'** Chief Justice Marshall in *Durousseau v. United States,* 6 Cranch, 307."

In all of the decisions which have succeeded the *Hill* case, this Court has consistently heeded the admonition of that case concerning respect for the spirit of the statute and the intent of its makers. The considerations stated in the *Hill* case were reiterated in *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32 (holding that a wooden steamer was a "public work" within the meaning of the statute), in *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337, and *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360 (construing and reconciling the ambiguous time limitations of the Heard Act), in *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444 (holding that a railroad which transports material for a public structure furnishes "labor" within the meaning of the statute) and in *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17 (holding that the provisions of the Miller Act specifying the method of serving notice on the prime contractor are directory only).

The court below acknowledged that the case before it was one of "first impression" (App. B to Pet. for Cert., p. viii), but it gave no consideration whatever to the pertinency of the *Hill* case and the many other applicable decisions of this Court to the solution of the question presented to it. It is not surprising,

therefore, that the court's conclusion that "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided in said contract' " (App. B. to Pet. for Cert., p. viii) is in direct conflict with decisions of this Court.

In *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, this court held that an assignee of the persons who furnished labor and materials to a project can sue on the bond. Speaking tersely and to the point, it said (p. 35):

> "The assignment of some of the claims did not affect the remedy. *United States v. Rundle,* 100 Fed. Rep. 400."

In the *Rundle* case the court explained its holding as follows (100 Fed. 403):

> "The general rule is that an assignment of a debt carries with it the security. The application of this general principle to such cases as the present accords with the obvious purpose of the statute, **while the limited construction contended for by the defendants in error might very well deprive those for whom the security was intended from realizing on their claims by assignment.**"

To the same effect, see:

U. S. Fidelity Co. v. Bartlett (1913) 231 U.S. 237;

Bartlett & Kling v. Dings (8th C.C.A. 1918) 249 Fed. 322, 325;

United States v. Brent (W.D.S.C. 1916) 236 Fed. 771, 777.

The court below summarized its holding as follows (App. B to Pet. for Cert., pp. ix-x):

> "The appellants [petitioners] are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor."

Assignees of laborers and materialmen are not "persons who furnished labor or materials" and yet this Court has held that they may maintain actions for recovery on Miller Act bonds. Where an assignment of labor claims has been made, the sums claimed are no longer "justly due" to the persons who furnished the labor, yet under the decisions of this Court, such fact has not barred the assignee from a recovery.

When the spirit and intent of the Miller Act are considered, petitioners, as trustees for the men who furnished labor to the projects, have a more direct claim to the security of the bonds than assignees of such workmen would have. When a laborer assigns his claim against a defaulting contractor he frequently does so at a discount, and when the assignee sues for the full amount of the claim, he acts in part for his personal benefit. Petitioners as trustees, on the other hand, are suing for the sole benefit of the laborers and whatever they recover will enure in its entirety to the benefit of such laborers.

Further, under California law petitioners are the assignees under an equitable assignment of the rights and claims of the laborers (*Matter of Schmidt* (S.D. Calif. 1953) 24 CCH Labor Cases, par. 68,012). In the leading case of *McIntyre v. Hauser* (1900) 131 Cal. 11, the California Supreme Court said (p. 14):

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. **If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.**"

To the same effect, see:

Goldman v. Murray (1912) 164 Cal. 419, 422.

It clearly appears from the entire transaction whereby the Fund administered by petitioners was established that the construction laborers who are the beneficiaries of the Fund have assigned to petitioners all of their rights in the portion of the consideration for their services which their employers have agreed to pay into the Fund. By the terms of the Trust Agreement the laborers are divested of any right to receive any part of the contributions to the Fund (R. 21, Exh. C, Art. II, Sec. 3) and petitioners are expressly given the right and authority to enforce the prompt payment of such contributions (Art. IV, Sec. 3).

In negotiating the Master Labor Agreements and the Trust Agreement, the Northern California District Council of Hod Carriers, Building and Construction Laborers acted as the collective bargaining repre-

sentative of the laborers. The health and welfare plan was a proper subject of collective bargaining (*National Labor Relations Board v. W. W. Cross & Co.* (1st C.C.A. 1949) 174 F. (2d) 875), and the Laborers Council had the power and authority to bind the laborers to all of the terms and conditions of the plan, including those of the Trust Agreement (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 337; *Potlatch Forests v. International Woodworkers* (D. Ida. 1951) 108 F. Supp. 906, *aff'd* (9th C.C.A. 1953) 200 F. (2d) 700; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (1955) 203 Or. 342, 279 Pac. (2d) 508, 512 *reh'g den.*, 280 Pac. (2d) 412). The Laborers Council therefore had authority to assign and did assign to petitioners, on behalf of the laborers, the rights of the latter in the health and welfare contributions which, in the words of the Senate Committee on Labor and Public Welfare, quoted *supra*, p. 25, "could otherwise be paid to the union members in wages."

It follows that in bringing this action to recover delinquent contributions petitioners are more truly representative of the laborers who actually performed services on the bonded projects than assignees would be. Their right to sue in their own names for the benefit of such laborers is clear under the decisions of this Court (*Stone v. White* (1937) 301 U.S. 532, 536; *Vetterlein v. Barnes* (1887) 124 U.S. 169, 173; *Kerrison, Assignee v. Stewart* (1876) 93 U.S. 155, 160), under the Federal Rules of Civil Procedure (Rule 17(a)) and under the statutory and decisional

law of California (California Code of Civil Procedure, section 369; *Thorpe v. Story* (1937) 10 Cal. (2d) 104, 114; *City of Oakland v. California Construction Co.* (1940) 15 Cal. (2d) 573, 578; *City of Oakland v. De Guarda* (1928) 95 Cal. App. 270, 285). Indeed, the parties considered petitioners' right to sue so clear that such right was conceded by respondent surety in the District Court. Counsel for respondent there said (R. 33): "[We] are not making any issue as to their [petitioners'] right to bring this action . . . We are not interested in raising any question of right to sue, capacity or any such matters."

In the light of the foregoing, no undue stretching of the terms of the Miller Act would be required by a holding that the sums which petitioners seek to recover in this action are "justly due" to the workmen who furnished labor to the bonded projects and that petitioners have the right under the Act to recover such sums from respondent as the equitable assignees of, and as trustees for, such laborers. Such a holding, we submit, is the only one which would be consistent with the spirit and intent of the Miller Act and with the long line of decisions of this Court which have construed the Act and its predecessor statutes liberally to effectuate such spirit and intent (*Guaranty Co. v. Pressed Brick Co.* (1903) 191 U.S. 416, 426; *Hill v. American Surety Co.* (1906) 200 U.S. 197, 203; *Mankin v. Ludowici-Celadon Co.* (1910) 215 U.S. 533, 537; *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32; *Equitable Surety Co. v. McMillan* (1914) 234 U.S. 448, 455; *A. Bryant Co. v.*

N. Y. Steam Fitting Co. (1914) 235 U.S. 327, 337; *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360; *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444; *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17).

B. The conclusion above-stated likewise follows when the Act is construed from the standpoint of the protection of the United States Government.

This Court has held that the Miller Act was enacted not only for the protection of the individual laborers and materialmen but also for the protection of the United States Government against the disruption and delay of its public works projects which would result if the laborers or materialmen sought other means of enforcing their just claims.

In *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, in holding that freight charges of a railroad constitute "labor" within the meaning of a payment bond, this Court said (pp. 443-445):

> "Petitioner maintains that freight cannot be considered as 'labor or material' without doing violence to the words of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.
>
> *Stuart for use of Florida East Coast Ry. Co. v. American Surety Co.*, Circuit Court of Appeals Fifth Circuit (1930) *supra* carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in the present cause.
>
> * * * * * * *

> Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. **Refusal by the carrier to deliver material until all charges are paid might seriously impede the progress of public works, possibly frustrate an important undertaking.**"

In *City of Stuart v. American Surety Co.* (5th C.C.A. 1930) 38 F. (2d) 193, to which this Court had referred with approval in the *Standard Ins. Co.* case, the court said (p. 195):

> "In addition to protecting the honest claims of persons who have contributed to the performance of the job, the legislative intent no doubt was also **to minimize impediment and delay of the work, and facilitate procurement of labor and materials, through the security afforded by the bond.** If the carrier is included in its benefits, this intent will be served. If he is not included, he must hold the freight until payment is made, and sell it for charges if it is not, to the embarrassment of the work."

The reasoning of the court in the *Standard Ins. Co.* case applies with peculiar force to claims for health and welfare contributions. As we have pointed out, the obligation to make these contributions is imposed by the Master Labor Agreements with the Northern California District Council of the Laborers Union. Every major construction project in Northern California is manned under the terms and conditions of

these agreements, and the right of the individual contractor to procure laborers for his projects is dependent upon adherence to and compliance with these Master Agreements.

Since it has been stipulated that the agreement to make health and welfare contributions was part of the consideration for the services of the laborers who worked on the bonded projects (R. 7-9, 13), a breach of that agreement would clearly entitle the laborers to withdraw their services, and their union to exercise its economic power of striking and picketing to remedy the default (*Sherman v. Achterman,* App. C. to Pet. for Cert. p. xv; *William Dunbar Co., Inc. v. Painters & Glaziers Dist. Coun.* (D.C.D. of C. 1955) 129 F. Supp. 417, 424). Therefore, the holding of the court below, that building tradesmen are not entitled to the protection of a Miller Act bond insofar as payments to welfare funds are concerned, leaves every federal project in the vast areas in which such funds are now established vulnerable to interruption and delay if the contractor becomes delinquent in his payments. For this reason, just as in the freight cases, a holding that health and welfare contributions are covered by the security of the bond is important to the protection of the Government as well as of the individual laborer.

III.

THE OBLIGATION TO PAY LIQUIDATED DAMAGES AND ATTORNEYS' FEES IN THE EVENT OF A DEFAULT IS A PART OF THE TOTAL OBLIGATION ASSUMED BY THE PRIME CONTRACTOR IN CONSIDERATION FOR THE SERVICES SUPPLIED TO HIM, AND CONSEQUENTLY THIS OBLIGATION IS LIKEWISE COVERED BY THE PAYMENT BONDS.

At the time the Health and Welfare Plan was negotiated with the Laborers Council, the contractors were concerned about the uncertain liabilities which might be involved in an agreement to make contributions to a fund to provide insurance for their employees. Specifically, they were concerned with a claim made by the Council that a delinquent employer could be held liable for the full amount of any insurance benefits lost through such delinquency (see *Frankel, The Health and Welfare Trust: Damages for Failure to Contribute* (1954) 5 CCH Labor Law Journ. 28). Various provisions protecting against any such uncertain liability were negotiated as a part of the Trust Agreement, including the following provision of Section 8 of Article II (Exh. C, R. 21):

> ". . . The parties recognize and acknowledge that the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult, if not impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an individual employer to pay such monthly contributions in full within the time above provided. Therefore, the amount of damage to the Fund and Health and Welfare Plan

resulting from any such failure shall be presumed to be the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in San Francisco, California, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions."

The parties likewise provided in Section 3 of the Article IV of the Trust Agreement (R. 21) as follows:

"The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim."

Under these provisions the obligation to pay liquidated damages and reasonable attorneys' fees in the event of default is an integral part of the total obligation of the defendant contractor to make health and welfare contributions with respect to the services of laborers working on its Government projects. Liquidated damages and attorneys' fees were a part

of the agreed payment for labor which was held to be recoverable against the surety in *Sherman v. Achterman, supra,* and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond.

United States v. Breeden (D. Alaska 1953) 110 F. Supp. 713;

United States v. Henley (D. Ida. 1954) 117 F. Supp. 928.

In *United States v. Breeden, supra,* the court said with respect to attorneys' fees (p. 715):

> "We must first consider the precise language of the Miller Act in this respect, which is that the payment bond is given 'for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.' No specific limitation has been found in this act or any other Federal law which forbids the allowance of attorneys' fees as part of costs for the persons who are obliged to bring suit on surety company's bonds. The text of the law would indicate it must have been the purpose of Congress to protect all persons supplying labor and material in the prosecution of work upon such contracts. Surely, the Congress cannot have contemplated that the persons supplying such labor and material should be obliged, in the event of the default of the contractors, to pay to their own attorneys without recompense a substantial portion of the amounts actually due them for the labor and materials supplied to the contractors. Such a rule would penalize the suppliers to the advantage of the sureties on the contractors' bonds. **The protec-**

tion demanded by the law is full protection to the suppliers and not partial protection, as would be the case if the attorneys' fees of the suppliers who are obliged to bring suit, could not be taxed as a part of the costs."

CONCLUSION.

This case, and the *Achterman* case in the State court, are cases "of first impression" which present one aspect of the problem of making the manifest benefits of low-cost group health insurance available to the men who perform the casual employment which characterizes the building and construction industry.

The widespread utilization of group health insurance is a modern development but the social desirability and need for such insurance is attested by the rapidity of its growth.

In its final report on the "Welfare and Pension Plans Investigation," already referred to (*supra,* pp. 26-27), the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare reported as follows (Senate Report No. 1734, 84th Cong., 2d Sess., p. 2):

> "From 1945 to 1954 the number of persons covered by group life insurance more than doubled—from 11.4 to 28.7 million. In the same period, those covered by insurance companies under group hospital expense policies increased more than fourfold—from 7.8 to 35.1 million—while those covered by Blue Cross plans rose from 19 to 44 million. A similar growth took place in

the number of employees covered by private pension plans—from 5.6 to 12.5 million in the decade 1945-54.

"Today an estimated 75 million individuals—workers and their dependents—rely upon some form of group benefits program to meet the contingencies of sickness, accident, old age, and death. The plans or insurance policies underlying all programs number approximately half a million. Total contributions to all programs in 1954 reached an estimated $6.8 billion. Reserves of pension funds aggregate $20 to $25 billion.

"The existence of welfare and pension programs is a tribute to the free enterprise system. **They constitute an important underpinning of our economic security, broadening and supplementing the various governmental programs.**"

A large industry-wide health and welfare plan, such as the one administered by petitioners for the construction laborers in Northern California, provides the most economical and effective means of making health insurance benefits available to building tradesmen. Under such a plan many small contractors and builders, by contributing a fixed amount per hour of work to a central trust fund, can provide benefits for their employees far in excess of those which they could purchase for the same money as individual employers. Conversely, under the plan building tradesmen who are required by the nature of their employment to shift continually from one employer to another can pool their credits with the central fund so as to secure continuous insurance coverage without

regard to the number of employers for whom they work or the period of their employment with any single employer. The central trust fund, administered by trustees who are chosen representatives of employers and employees in the industry, provides an essential focal point, to which the contributions of thousands of employers can be directed, which can purchase insurance coverage at a minimum cost from a single carrier and which can receive and pay promptly the claims originating from the thousands of employees and dependents who are covered by the health and welfare plan.

Using petitioners' Fund by way of illustration, during the fiscal year of the Fund which ended May 31, 1956, over 5000 individual employers contributed a total of $3,297,786 to the Fund. The Fund during that year provided over 18,000 construction laborers with insurance coverage for themselves and their dependents consisting of $2000 life insurance on the employee, plus accidental death and dismemberment insurance in the amount of an additional $2000; life insurance on dependents ranging from $100 to $1000 depending upon age; and hospital and surgical benefits for the non-occupational injury or illness of the employee and his dependents, consisting of full reimbursement for the cost of ward service in a hospital for a maximum of 70 days, reimbursement for special hospital charges in full up to $400 plus 75% of charges over $400, surgical expense benefits under a $300 surgical schedule, reimbursement for doctor's home, office and in-hospital calls, X-ray and labora-

tory expense reimbursement up to $50 and supplemental accident expense payments up to $300.

The Court will at once appreciate the tremendous social value which is attached to benefits of this sort. Men who, in the past, would have become public charges when misfortune struck are now being provided with complete hospital, medical and surgical care out of funds created through their own toil and sweat. They receive needed care and attention without the stigma of public charity and without drain on the taxpayer. Because they know that the cost will not come out of their meager savings, if any, they are encouraged to seek medical and hospital attention at an early stage of an illness or for an injury which, if unattended, could have serious consequences. In addition, hospitals and doctors have assurance that their bills will be paid promptly, thereby creating important savings in the over-all cost of hospital, surgical and medical care.

In order to make health and welfare funds feasible for the building and construction industry, it has been necessary (1) to provide that contributions be made directly to the funds by the employers rather than by the employees; (2) to look to the unions rather than to the individual employees for the necessary authorizations; (3) to provide that the individual employees shall have no interest in the contributions as distinguished from the benefits to be provided by the funds; and (4) to require that individual employees meet minimum work requirements in order to enjoy the benefit of the funds. In the absence

of these provisions, the funds would be faced with insurmountable problems of collection, endless litigation concerning the rights of employees who did not qualify for coverage and the insoluble problem of providing substantial benefits for men who did not earn sufficient contributions to pay for such benefits.

We submit that these necessary peculiarities of health and welfare funds in the building and construction industry should not be used as makeweight arguments to stultify and emasculate the clear obligation of the respondent surety to pay in full for all work or labor performed on the bonded projects. Both reason and equity demand that health and welfare contributions be held to be within the coverage of the bonds in suit.

As the Court pointed out in the *Achterman* case (App. C. to Pet. for Cert., p. xv), the health and welfare contributions which the individual contractors have agreed to pay as partial consideration for the services of the construction laborers are the life blood of the Fund. If these contributions were not paid, the Fund would quickly disappear and the substantial benefits described above would end. While the failure of a single contractor to make his contributions would have slight effect upon the Fund, an accumulation of such failures would threaten its destruction, and would most certainly deprive those men who worked for the delinquent contractors of the insurance coverage which they had earned by their labor.

We respectfully submit that, in the light of the foregoing, no stretching or "extending" of the letter

of the Miller Act is required to hold that petitioners, and the laborers for whom they are trustees, are entitled to the security of respondent's bonds. Contrary to the conclusion of the District Court (R. 26), the contributions sought to be recovered are directly related to work performed on the contractor's government projects. They came due solely because such work was furnished and their amount is measured exactly by the number of hours of work performed. Certainly it was the intent of Congress to protect the laborer as to every element of his compensation and the novelty of the health and welfare element should not preclude a holding that such element is just as much within the protection of the bond as the laborer's hourly wage.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court with the direction that a summary judgment be entered in favor of petitioners.

Dated, August 20, 1956.

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(Appendix A Follows.)

Appendix A

The provisions of the Miller Act (Act of August 24, 1935, c. 642, 74th Cong., 1st Sess., 49 Stat. 793, 40 U.S.C., Secs. 270a-270e) are as follows:

AN ACT requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled.

Section 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all

persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expira-

tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District

Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Section 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Section 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before

the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended, is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.